U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0329 BLA

JOSEPH FLEMING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ABERRY COAL, INCORPORATED	)	DATE ISSUED: 07/31/2015
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Nate D. Moore (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Dominique Sinesi (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand - Award of Benefits (2012-BLA-05241) of Administrative Law Judge Daniel F. Solomon rendered on a subsequent

claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time. In his original Decision and Order, the administrative law judge credited claimant with at least fifteen years of underground coal mine employment and accepted employer's concession that claimant is totally disabled from a respiratory impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge therefore found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305. Further, the administrative law judge found that the presumption was not rebutted. Accordingly, the administrative law judge awarded benefits.

In response to employer's appeal, the Board affirmed the administrative law judge's findings that claimant's coal mine employment was underground and that claimant is totally disabled from a respiratory impairment at 20 C.F.R. §718.204(b). *Fleming v. Aberry Coal, Inc.*, BRB No. 13-0237 BLA, slip op. at 2 n.4 (Dec. 17, 2013)(unpub.). The Board also held that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *Fleming*, BRB No. 13-0237 BLA, slip op. at 2 n.4. However, the Board vacated the administrative law judge's findings that claimant established at least fifteen years in underground coal mine employment and was entitled to invocation of the rebuttable presumption at amended Section 411(c)(4), and remanded the case for further consideration of the evidence.[2] *Fleming*, BRB No. 13-0237 BLA, slip op. at 5.

The Board determined that the administrative law judge failed to adequately explain the method he used to compute the length of claimant's coal mine employment. Specifically, the Board noted that it could be discerned that the administrative law judge credited the district director's determination that claimant had 9.25 years of coal mine employment because it was consistent with claimant's Social Security Administration (SSA) earnings records and "the product of a reasonable method of computation." *Fleming*, BRB No. 13-0237 BLA, slip op. at 4. However, the Board stated that "the

[1] Claimant filed his first claim in November 1994. Director's Exhibit 1. It was finally denied by the district director in May 1995, because claimant failed to establish any of the elements of entitlement. *Id*. Claimant filed this pending claim in July 2010. Director's Exhibit 3.

[2] Employer also challenged the administrative law judge's finding that it failed to establish rebuttal of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Because the Board vacated the administrative law judge's finding that claimant invoked the amended Section 411(c)(4) presumption, the Board declined to address employer's arguments regarding rebuttal of the presumption. *Fleming v. Aberry Coal Co.*, BRB No. 13-0237 BLA, slip op. at 6 (Dec. 17, 2013)(unpub.).

method by which the administrative law judge derived at least an additional five years of coal mine employment from claimant's hearing testimony … [was] not apparent." *Id*. Consequently, the Board stated that it could not determine "whether the method the administrative law judge used [was] a reasonable one." *Fleming*, BRB No. 13-0237 BLA, slip op. at 5. The Board also noted that the administrative law judge failed to explain how he resolved the conflict between his determination that claimant is not a "good historian" and his crediting of claimant's testimony. *Fleming*, BRB No. 13-0237 BLA, slip op. at 5. The Board additionally noted that the administrative law judge failed to "address the significance of claimant's statement that he could not identify which employer failed to withhold Social Security taxes." *Id*. Further, the Board noted that the administrative law judge did not resolve conflicts in the evidence regarding the years in which claimant engaged in coal mine employment. *Id*. The Board stated that "the administrative law judge accounted for the periods of unemployment to which claimant testified, but did not consider the fact that claimant's [SSA earnings records] reflect that [claimant] was also unemployed in 1986 and had no coal mine employment in 1987." *Id*. The Board therefore determined that the administrative law judge's decision did not comply with the Administrative Procedure Act (APA). *Id*. Hence, the Board instructed the administrative law judge, on remand, to consider all the relevant evidence of record in ascertaining the dates and length of claimant's underground coal mine employment, including, but not limited to, claimant's testimony, the employment history forms submitted in both claims,[3] and claimant's SSA earnings records. *Fleming*, BRB No. 13-0237 BLA, slip op. at 5-6.

The Board also instructed the administrative law judge that he may total the partial periods of claimant's employment or divide claimant's yearly income from work he performed as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS),[4] in accordance with 20 C.F.R. §725.101(a)(32)(iii), if the evidence failed to establish the beginning and ending dates of claimant's coal mine employment or if any of claimant's work lasted less than a calendar year. *Fleming*, BRB No. 13-0237 BLA, slip op. at 6. The Board also instructed the administrative law judge that he may reinstate his finding that claimant is entitled to invocation of the rebuttable presumption at amended Section 411(c)(4) and further

[3] The Board acknowledged employer's allegation that there is a conflict between the evidence in claimant's first claim and his subsequent claim regarding the ending date of his coal mine employment. *Fleming*, BRB No. 13-0237 BLA, slip op. at 6 n.7.

[4] The Board rejected employer's allegation that the administrative law judge is required to either apply the formula provided by the regulation at 20 C.F.R. §725.101(a)(32)(iii), or explain why he did not apply it, because the administrative law judge's use of this formula is discretionary. *Fleming*, BRB No. 13-0237 BLA, slip op. at 6 n.8.

reinstate the award of benefits, if on remand he found that claimant established fifteen years of qualifying coal mine employment. *Id*. Conversely, the Board instructed the administrative law judge that he must consider whether claimant established entitlement to benefits pursuant to 20 C.F.R. Part 718, without the benefit of the rebuttable presumption at amended Section 411(c)(4), if he found that claimant was unable to establish fifteen years of qualifying coal mine employment. *Id*.

On remand, the administrative law judge again determined that claimant established over fifteen years of underground coal mine employment. Accordingly, the administrative law judge again awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant established over fifteen years of qualifying coal mine employment. Employer also contends that the administrative law judge erred in previously finding that it failed to establish rebuttal of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter, declining to file a substantive brief in this appeal, but noting that the administrative law judge may take official notice of documents regarding the credibility of Dr. Wheeler's x-ray readings,[5] if the Board vacates the administrative law judge's award of benefits and remands the case for further consideration.[6]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[7] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[5] In support of his argument, the Director identifies several documents "pertaining to the credibility of Dr. Wheeler's x-ray readings" including BLBA Bulletin 14-09, issued June 2, 2014, which instructs District Directors to not credit Dr. Wheeler's negative readings for pneumoconiosis in the absence of persuasive evidence rehabilitating his readings.

[6] Employer has filed a brief in reply to claimant's response brief, reiterating its prior contentions regarding the administrative law judge's length of coal mine employment finding.

[7] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibits 1, 4, 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, that he has a totally disabling respiratory or pulmonary impairment, and that his total disability is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

In 2010, Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this living miner's claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

Initially, we will address employer's contention that the administrative law judge erred in finding that claimant established over fifteen years of qualifying coal mine employment. In determining the length of claimant's coal mine employment, the administrative law judge considered claimant's applications for benefits, his testimony at the hearing, and the SSA earnings records submitted with this claim. The administrative law judge noted that claimant testified that he worked in the coal mines from 1970 until about August or September of 1991.[8] Decision and Order on Remand at 2. The administrative law judge also noted that the SSA earnings records showed that claimant's

[8] In addressing employer's assertions regarding the ending date of claimant's coal mine employment, the administrative law judge noted that claimant indicated on the prior 1994 claim form that he stopped working in April of 1991. Decision and Order on Remand at 4. The administrative law judge also noted that claimant subsequently testified at the October 16, 2012 hearing that he stopped working in the coal mines in August or September of 1991. *Id*.; Hearing Tr. at 15. In considering the discrepancy in the evidence regarding the ending date of claimant's coal mine employment, the administrative law judge explained that "[c]laimant was not confronted with it at hearing." Decision and Order on Remand at 4. Moreover, the administrative law judge found that "it is not crucial to a credibility determination as more importantly, that evidence is twenty years old and I note that with time, memory may recede." *Id*. at 4-5. The administrative law judge therefore rejected employer's argument that "[c]laimant's memory and testimony is too vague, and [found] that to a reasonable degree of probability, he is to be believed." *Id*. at 5.

coal mine employment began in 1970 and ended in 1991.[9] *Id*. Additionally, after noting that "[t]he period in question covers more than a twenty year period," the administrative law judge noted that claimant acknowledged that he did not work for about a year due to an injury, that he did not work during "a few other periods on account of his back injury," and that he spent one year working in construction in Florida. *Id*.; Hearing Tr. at 15-18. The administrative law judge nevertheless determined that "[t]he records do not substantiate that [claimant] was out of work for as long as six years due to compensation related injuries." Decision and Order on Remand at 5. Hence, the administrative law judge found that claimant established a total of over fifteen years in underground coal mine employment.

Employer asserts that the administrative law judge failed to adequately explain how he computed the length of claimant's coal mine employment. We disagree. Since the Act fails to provide any specific guidelines for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence in the record considered as a whole. *See Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Smith v. National Mines Corp.*, 7 BLR 1-803 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1983); *Maggard v. Director, OWCP*, 6 BLR 1-285 (1983). In this case, the administrative law judge considered claimant's testimony that the SSA earnings records did not substantiate all of his coal mine employment because "some of his employers did not generate Social Security records."[10] Decision and Order on Remand at 5. After

[9] As noted by the administrative law judge in his prior decision, "the [district director] arrived at the 9.25 figure by comparing claimant's earnings to the average yearly earnings of coal miners listed in Exhibit 610, based on 125 days of exposure, or less than half the number of work days in a year." Decision and Order at 4. The administrative law judge also noted that "[e]mployer argues that the provision from §725.493(b) equating 125-days to a full year applies only to calculations identifying the responsible operator." *Id*. In considering this case on remand, the administrative law judge found that the Department of Labor's (DOL) method of determining length of coal mine employment is reasonable. Nevertheless, the administrative law judge relied on claimant's testimony from the hearing. The administrative law judge stated, "I listened to the testimony, and I had an opportunity to observe the [c]laimant and I found that he is credible, and the DOL did not take his allegations into consideration." Decision and Order on Remand at 5. Hence, while the administrative law judge accepted the district director's length of coal mine employment determination based on the record, he found that "the [c]laimant is credible that he actually worked more than that." *Id*. at 6.

[10] It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988).

noting claimant's assertion that "even if he 'is not a good historian' his testimony may still be credible," the administrative law judge determined that claimant's testimony was neither conflicting, nor inaccurate. *Id*. at 4. The administrative law judge further determined that "[c]laimant may have struggled to remember how much money he earned at a job he worked over forty years ago, but this does not discredit his testimony if he remembers how long he worked at a particular coal mine site." *Id*. Additionally, the administrative law judge determined that "[i]t is reasonable to expect that [claimant] also worked for periods 'under the table,' as alleged, early in his career, in the 1970's." *Id*. at 5; Hearing Tr. at 17, 23. Because the administrative law judge acted within his discretion in crediting claimant's testimony that "he worked more than [fifteen] years in mining," Decision and Order on Remand at 5; *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), we reject employer's assertion that the administrative law judge failed to adequately explain how he computed the length of claimant's coal mine employment. Moreover, because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant established over fifteen years of qualifying coal mine employment.

Furthermore, in view of our affirmance of the administrative law judge's finding that claimant established over fifteen years of qualifying coal mine employment, we also affirm the administrative law judge's determination to reinstate his prior finding that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).

Next, we address employer's contention that the administrative law judge erred in previously finding that it failed to establish rebuttal of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).[11] Employer asserts that the administrative law judge erred in previously finding that it did not establish the absence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). In his prior Decision and Order, the administrative law judge noted that "[t]he evidence consists of 9 readings of four x-rays [dated January 14, 2011,[12] April 20, 2011, January 16, 2012 and March 28, 2012]," that five of the readings were positive for pneumoconiosis and that four of the readings were negative. Decision and Order at 6. Dr. Baker, a B reader, and Dr. Alexander, a dually-qualified B reader and Board-certified radiologist, read the January 14, 2011 x-ray

[11] Once the presumption of total disability due to pneumoconiosis is invoked at amended Section 411(c)(4), the burden shifts to employer to rebut the presumption by showing that the miner does not have pneumoconiosis, or that no part of his disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(i), (ii).

[12] Dr. Barrett, a dually-qualified B reader and Board-certified radiologist, read the January 14, 2011 x-ray for quality only. Director's Exhibit 12.

as positive for pneumoconiosis, Director's Exhibits 12, 14, while Dr. Wheeler, a dually-qualified radiologist, read this x-ray as negative, Director's Exhibit 16. Further, Dr. Alexander read the April 20, 2011 x-ray as positive for pneumoconiosis, Claimant's Exhibit 1, while Dr. Scott, who is also a dually-qualified radiologist, read this x-ray as negative, Employer's Exhibit 10. Additionally, Dr. DePonte, a dually-qualified radiologist, read the January 16, 2012 x-ray as positive for pneumoconiosis, Claimant's Exhibit 3, while Dr. Scott read this x-ray as negative, Employer's Exhibit 6. Lastly, Dr. Alexander read the March 28, 2012 x-ray as positive for pneumoconiosis, Claimant's Exhibit 5, while Dr. Scott read this x-ray as negative, Employer's Exhibit 9. After noting that Dr. Baker was the only physician who was not a dually-qualified radiologist, the administrative law judge determined that the readings of the dually-qualified radiologists were in equipoise. Then the administrative law judge gave less weight to Dr. Scott's reading of the March 28, 2012[13] x-ray because he found that it was equivocal. Conversely, the administrative law judge gave dispositive weight to Dr. Alexander's positive reading of the March 28, 2012 x-ray based on recency. The administrative law judge therefore found that employer failed to disprove the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Employer argues that the administrative law judge should have accorded dispositive weight to the negative x-ray readings of Drs. Wheeler and Scott because of their superior credentials. In considering the credentials of the radiologists, the administrative law judge acknowledged that, in addition to being dually-qualified as B readers and Board-certified radiologists, Drs. Wheeler and Scott have "teaching experience at Johns Hopkins Medical School." Decision and Order at 7. Nevertheless, the administrative law judge did not give dispositive weight to the negative readings of Drs. Wheeler and Scott on this basis. While an administrative law judge may accord greater weight to x-ray readings provided by physicians who are professors of radiology, as well as dually-qualified radiologists, he is not required to do so. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(en banc). Thus, we reject employer's assertion that the administrative law judge should have accorded dispositive weight to the negative readings of Drs. Wheeler and Scott because they are professors of radiology in addition to being dually-qualified radiologists.

Employer also argues that the administrative law judge erred in discounting Dr. Scott's negative reading of the March 28, 2012 x-ray. Specifically, employer asserts that the administrative law judge applied a greater degree of scrutiny to Dr. Scott's negative reading than he applied to Dr. Alexander's positive reading of the same x-ray. We

[13] The administrative law judge's characterization that the most recent x-ray read by Dr. Scott was taken on September 19, 2012 appears to be a typographical error. Decision and Order at 7. The record indicates that the March 28, 2012 x-ray was read by Dr. Scott on September 19, 2012. Employer's Exhibit 9.

disagree. An administrative law judge must determine whether a reading is positive, by showing a 1/0 or greater profusion of the opacities, or negative. 20 C.F.R. §§718.102, 718.202(a). Further, an administrative law judge may consider a doctor's narrative explanation on an ILO form when an x-ray interpretation is *negative* for pneumoconiosis. S*ee* 20 C.F.R. §718.202(a)(1); *Cranor v. Peabody Coal Co*., 22 BLR 1-1, 1-5 (1999). In this case, the administrative law judge permissibly found that Dr. Scott's reading of the March 28, 2012 x-ray was equivocal, based on the doctor's comment that there is a possibility of cancer and emphysema, despite the administrative law judge's finding that "[t]here is no record of cancer." Decision and Order at 7; *see U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Thus, we reject employer's assertion that the administrative law judge erred in discounting Dr. Scott's reading of the March 28, 2012 x-ray.

Employer additionally argues that the administrative law judge erred in failing to weigh the x-ray readings submitted in the prior claim. We disagree. An administrative law judge may find that the most recent medical evidence more accurately reflects a miner's condition. *See Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004) (en banc); *Workman v. E. Associated Coal Corp.*, 23 BLR 1-22 (2004) (en banc). In this case, the record contains five readings of two x-rays, dated November 15, 1994 and February 23, 1995, that were submitted with the first claim, Director's Exhibit 1, and nine readings of four x-rays, dated January 14, 2011, April 20, 2011, January 16, 2012 and March 28, 2012, that were submitted with the subsequent claim, Director's Exhibits 12, 14, 16; Claimant's Exhibits 1, 3, 5; Employer's Exhibits 6, 9, 10. As discussed, *supra*, however, the administrative law judge reasonably focused on the newly submitted x-ray readings. *See Parsons*, 23 BLR at 1-35; *Workman*, 23 BLR at 1-27; Decision and Order at 6. Thus, we reject employer's assertion that the administrative law judge erred in failing to weigh the older x-ray readings submitted in the prior claim. Because the administrative law judge properly accorded dispositive weight to Dr. Alexander's positive reading of the March 28, 2012 x-ray based on recency, *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993), we affirm the administrative law judge's prior finding that employer failed to disprove the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1).[14]

[14] Employer argues that the administrative law judge previously erred in considering Dr. Wheeler's March 20, 2012 digital x-ray. Contrary to employer's assertion, in his prior decision, the administrative law judge permissibly found that "Dr. Wheeler did note emphysema and tuberculosis with question marks." Decision and Order at 7 n.5; *see U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Thus, we reject employer's assertion

Further, employer asserts that the administrative law judge erred in previously finding that it did not establish the absence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(2). Employer argues that "[the administrative law judge] mechanically and improperly [applied] the later evidence rule by refusing to consider Dr. Caffrey's 2005 biopsy report without further explanation. Contrary to employer's assertion, to the extent that the administrative law judge considered the evidence as it relates to claimant's condition as of the time of the hearing (as opposed to the date of onset), the administrative law judge permissibly accorded "little weight" to Dr. Caffrey's 2005 biopsy report because he found it to be "old." Decision and Order at 7; *see Parsons*, 23 BLR at 1-35; *Workman*, 23 BLR at 1-27. Thus, we affirm the administrative law judge's prior finding that employer failed to disprove the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(2).

Employer also asserts that the administrative law judge erred in previously finding that it did not establish the absence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4). Specifically, employer argues that the administrative law judge erred in discounting the opinions of Drs. Rosenberg and Dahhan. Contrary to employer's assertion, the administrative law judge permissibly found that the opinions of Drs. Rosenberg and Dahhan were flawed because the doctors relied on negative chest x-ray readings, which were contrary to the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis. *See Jordan*, 876 F.2d at 1460, 12 BLR at 2-374-75; *Taylor v. Ala. By-Products Corp.*, 862 F.2d 1529, 1531 n.1, 12 BLR 2-110, 2-112 n.1 (11th Cir. 1989); Decision and Order at 7. Thus, we affirm the administrative law judge's prior finding that employer failed to disprove the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4).[15]

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that the administrative law judge previously erred in considering Dr. Wheeler's March 20, 2012 digital x-ray. However, the administrative law judge further stated that "digital x-rays are deemed 'other' evidence under the rules and as I have already ruled for [c]laimant on the x-ray evidence, I choose not to do so with respect to 'other' evidence." Decision and Order at 7 n.5. In view of our disposition of the issue of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), (2) and (4), we need not address the administrative law judge's determination not to render a finding that claimant's digital x-ray reading established the existence of clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[15] Employer also asserts that "[the administrative law judge] erred in failing to consider whether the evidence ruled out legal pneumoconiosis." Employer's Brief at 25. In light of our decision to affirm the administrative law judge's prior finding that employer failed to disprove the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a), we need not address employer's assertion regarding the issue of legal pneumoconiosis. *See Larioni*, 6 BLR at 1-1278.

Employer also asserts that the administrative law judge erred in previously finding that it failed to carry its burden of proving that pneumoconiosis did not contribute to claimant's total disability. The administrative law judge stated that "the burden is on the [e]mployer to rule out [p]neumoconiosis as a cause for total disability." Decision and Order at 8. After noting that employer relied on the opinions of Drs. Rosenberg and Dahhan, the administrative law judge permissibly discounted the disability causation opinions of Drs. Rosenberg and Dahhan because the doctors opined that claimant does not suffer from clinical or legal pneumoconiosis, contrary to his finding on this issue. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom.*, *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Thus, we reject employer's assertion that the administrative law judge erred in previously finding that employer failed to carry its burden of proving that pneumoconiosis did not contribute to claimant's total disability. Because it is supported by substantial evidence, we affirm the administrative law judge's prior finding that employer failed to establish that no part of claimant's pulmonary or respiratory total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii); *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA (Apr. 21, 2015)(Boggs, J., concurring and dissenting).

We, therefore, affirm the administrative law judge's determination to reinstate his prior finding that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4).

We now address claimant's counsel's fee petition filed in connection with services performed before the Board from February 18, 2013 to December 28, 2013 in the prior appeal, BRB No. 13-0237 BLA. Claimant's counsel has filed a complete, itemized statement requesting a fee for services performed before the Board, pursuant to 20 C.F.R. §802.203. Claimant's counsel requests a total fee of $3,743.75 for 2.75 hours of legal services at an hourly rate of $300.00, 11.75 hours of legal services at an hourly rate of $225.00, and 2.75 hours of legal services at an hourly rate of $100.00.

Employer has filed an objection to claimant's counsel's fee petition. Specifically, employer contends that claimant's counsel's fee petition is premature. Alternatively, employer contends that claimant's counsel charges for work that is clerical in nature and duplicative. Further, employer contends that claimant's counsel's use of quarter-hour billing for routine tasks is excessive. Claimant's counsel has not filed a response to employer's objections.

We reject employer's contention that claimant's counsel's fee petition is premature. 20 C.F.R. §802.203(c). We also reject employer's contention that the time charged by claimant's counsel for entries on May 9, 2013 and June 11, 2013 related to certified letters to the Board is excessive and should be reduced from 0.5 hour to 0.2

hour. Claimant's counsel's practice of billing in one-quarter hour increments is reasonable. 20 C.F.R. §802.203(d)(3). However, we agree with employer that entries listed on March 4, 2013, April 8, 2013, June 18, 2013 and December 28, 2013 as taking telephone calls from client wishing to discuss the case with someone is a clerical duty for which separate billing is not permissible. *Whitaker v. Director, OWCP*, 9 BLR 1-216 (1986). Further, we agree with employer that entries listed on March 1, 2013, March 27, 2013 and April 18, 2013 for reviewing the file are duplicative of services performed on February 18, 2013, March 6, 2013 and April 9, 2013. Therefore, we disallow 1.75 hours claimed for these services at the hourly rate of $100.00. We find that the remaining time is reasonable and commensurate with the necessary services performed in defending claimant's award of benefits.

Therefore, we approve a total fee of $3,568.75 for 2.75 hours of legal services at an hourly rate of $300.00, 11.75 hours of legal services at an hourly rate of $225.00, and 1.00 hour of legal services at an hourly rate of $100.00 rendered in defense of this claim. The fee is to be paid directly to claimant's counsel by employer.[16] 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203; *see Clark v. Director, OWCP*, 9 BLR 1-211 (1986).

Accordingly, the administrative law judge's Decision and Order on Remand - Award of Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

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GREG J. BUZZARD
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

[16] This fee award is neither enforceable nor payable until such time as an award of benefits is final. *See* 33 U.S.C. §928; *Wells v. Int'l Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (CRT)(7th Cir. 1982); *Spinner v. Safeway Stores, Inc.*, 18 BRBS 155 (1986).

I respectfully dissent from the majority's decision to affirm the administrative law judge's award of benefits. I would vacate the award of benefits and remand the case for further consideration. Specifically, I would vacate the administrative law judge's finding that claimant has over 15 years in underground coal mine employment. As employer asserts, the administrative law judge failed to adequately explain how he computed the length of claimant's coal mine employment. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). The administrative law judge found that claimant's testimony that the Social Security Administration (SSA) earnings records did not substantiate all of his coal mine employment was credible. Decision and Order on Remand at 5. However, the administrative law judge did not explain how he resolved the discrepancies in claimant's testimony with the SSA earnings records regarding the location and duration of some of claimant's coal mine jobs. *Wojtowicz*, 12 BLR at 1-165. Although the administrative law judge credited claimant with five full years of coal mine employment from 1970 to 1974, claimant's testimony and his SSA earnings records show that he also worked in non-coal mine employment during this time period.[17] Specifically, the SSA earnings

[17] During the hearing, claimant responded to the following questions from claimant's counsel regarding the length of his coal mine employment:

> Q. You said you started working in the mines since '71, you think?
> A. Yes.
> Q. Okay. That would be Archer and Club Coal Company maybe?
> A. That could have been. I just don't remember exactly.
> Q. Actually, it looks like there's some employment for Highpoint Coal Company in 1970?
> A. Yeah, I think that was probably the first one.
>
> ******
>
> Q. In 1970. It shows some earnings of $72.00. How long did you work for Peem Coal Company in 1970?
> A. I know I was there close to a year.
> Q. Just so we're clear on this, it also shows some work for Clark Super 100 in Clarksburg, Tennessee in 1970?
> A. It could have been. I couldn't say for sure with my life.
> Q. Okay, there's also a little bit of work in Biloxi, Mississippi.
> A. I do remember that.
> Q. In 1970.
> A. Yes. Yes, I do remember that.

Hearing Tr. at 17, 24-25.

records show that claimant worked in 1970 for Broad Water Beach Hotel in Biloxi, Mississippi, and for Clark Super 100 in Cookeville, Tennessee. Director's Exhibit 7 at 4-5. Likewise, claimant provided testimony that between 1970 and 1974 he worked in construction for a year in Florida. Hearing Tr. at 17-18, 24-25, 27-28. Moreover, the SSA earnings records show that claimant worked in Florida in the third quarter of 1972 and the second quarter of 1973. Consequently, both claimant's testimony and the SSA earnings records indicate that claimant worked in Florida for a year between 1972 and 1973. While the administrative law judge accepted claimant's testimony that he worked for a total of five years in coal mine employment during the period from 1970 to 1974, Decision and Order on Remand at 3, he did not adequately explain how he resolved the discrepancy between claimant's testimony that claimant worked five years of coal mine employment during the period from 1970 to 1974 with claimant's testimony, as supported by the SSA earnings records, that he worked in construction in Florida for one year during the same period of time. In addition, the administrative law judge did not make a determination regarding the specific starting and ending dates for various employers, or reconcile employment time periods in instances where the dates are overlapping, or explain how he calculated partial years of employment. *Wojtowicz*, 12 BLR at 1-165. Rather, based on claimant's testimony that claimant worked "close to a

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Claimant also responded to the following questions from employer's counsel regarding the length of his coal mine employment:

> Q. Okay. There were several companies that you mentioned around the year 1971 which you said you worked for more than a year or a year for the company?
> A. Yeah.
> Q. Okay. Is it possible that you're mistaken with regard to the length of the employment with some of these companies?
> A. It very well could be.
> Q. Okay and the reason I'm asking you is you indicated that you felt like you worked for more than a year for Highpoint Coal and also for Archer and Club Coal.
> A. Yeah.
> Q. But both of those companies show employment in 1971.
> A. Yeah.
> Q. Okay, then there's also employment with Peem Corporation in 1971.
> A. I had these wrote down and I worked real hard. I'm not the sharpest tool in the shed as the old saying goes, but I worked real hard to get these as accurate as I possibly could, but not having any documentation, there was no way I could tell you 100 percent [for] sure about any of them.

Hearing Tr. at 32-33.

year," "almost a year," "about a year, maybe longer," "at least one year," and "one year," the administrative law judge determined that claimant worked a total of five years in coal mine employment from 1970 to 1974. Decision and Order on Remand at 2-3. In so doing, the administrative law judge failed to adequately explain how he resolved the conflicts in all the relevant evidence regarding the length of claimant's coal mine employment from 1970 to 1974. *Wojtowicz*, 12 BLR at 1-165. Further, I would hold that the administrative law judge failed to adequately explain his preference for claimant's testimony in 2012 over a form claimant completed many years closer in time to the work performed by him,[18] given the administrative law judge's observation that "with time, memory may recede." Decision and Order on Remand at 5; *see Wojtowicz*, 12 BLR at 1-165. In view of the foregoing, I would hold that the administrative law judge's finding that claimant established over fifteen years in coal mine employment was not based on a reasonable method of computation and is not in compliance with the Administrative Procedure Act (APA).[19] I would therefore vacate the administrative law judge's finding that claimant established over fifteen years of qualifying coal mine employment and again remand the case for further consideration of all the relevant evidence in accordance with the APA. On remand, I would instruct the administrative law judge to render a specific length of coal mine employment finding, based on a reasonable method of computation.

Further, because I would vacate the administrative law judge's finding that claimant established over fifteen years of qualifying coal mine employment, I would also vacate the administrative law judge's determination that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). I would instruct the administrative law judge that he may reinstate his finding that claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) if he again finds that claimant establishes fifteen years of qualifying coal mine employment.

[18] As noted by the administrative law judge, although claimant indicated on a 1994 claim form that he stopped working in April of 1991, he subsequently testified at the October 16, 2012 hearing that he stopped working in the coal mines in August or September of 1991. Decision and Order on Remand at 4; Hearing Tr. at 15. The administrative law judge inexplicably determined that the discrepancy in claimant's 1994 claim form and his 2012 hearing testimony regarding when claimant stopped working in the coal mines "is not crucial to a credibility determination." Decision and Order on Remand at 4-5.

[19] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Additionally, I would instruct the administrative law judge to reconsider whether employer has established rebuttal of the presumption at amended Section 411(c)(4), as employer's assertions that the administrative law judge previously erred in finding that employer failed to disprove the existence of clinical pneumoconiosis have merit. After initially concluding that the readings of the dually-qualified radiologists were in equipoise, the administrative law judge stated:

> However, a review of the opinions shows that in the most recent x-ray, [dated March 28, 2012], EX 9, Dr. Scott rated the film quality as a 2, due to scapular overlay and also noted a 1.5 cm nodule and possible cancer and emphysema. There is no record of cancer. Emphysema may evidence legal pneumoconiosis. I find that this is an equivocal reading and attribute less weight to it.

Decision and Order at 7. While an administrative law judge may consider a doctor's narrative explanation on an ILO form when an x-ray interpretation is negative for pneumoconiosis, s*ee* 20 C.F.R. §718.202(a)(1); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5 (1999), the interpretation of medical data is for the medical experts. *Marcum v. Director OWCP*, 11 BLR 1-23 (1987). To the extent the administrative law judge discounted Dr. Scott's negative x-ray reading because he found the doctor's comment, that there is a possibility of emphysema, suggests that claimant may have legal pneumoconiosis, the administrative law judge erroneously substituted his opinion for that of the physician. *Marcum*, 11 BLR at 1-24. In addition, as employer argues, I would hold that the administrative law judge erred in failing to consider the negative readings of the x-rays dated November 15, 1994 and February 23, 1995. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984); Director's Exhibit 1. Therefore, I would vacate the administrative law judge's prior finding that employer failed to disprove the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1).[20]

[20] Employer further argues that the administrative law judge previously erred in weighing Dr. Wheeler's March 20, 2012 digital x-ray. In his prior decision, the administrative law judge noted that "[b]oth of the parties submitted readings of a [March 20, 2012] digital image" and that "[t]he readings oppose each other." Decision and Order at 7 n.5. After noting claimant's position that Dr. Wheeler's interpretation of the March 20, 2012 digital x-ray should be discounted, the administrative law judge stated, "digital x-rays are deemed 'other' evidence under the rules and as I have already ruled for [c]laimant on the x-ray evidence, I choose not to do so with respect to 'other' evidence." Decision and Order at 7 n.5. Digital x-rays constitute other medical evidence, and the admissibility of digital x-rays is governed by 20 C.F.R. §718.107. *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-135 (2006)(en banc)(Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1, 1-7-8 (2007)(en banc). Pursuant to 20 C.F.R. §718.107(b), the administrative law judge was required to determine, on a case-by-case basis, whether the proponent of the digital x-ray evidence has established that it is medically acceptable and

Further, because I would vacate the administrative law judge's prior finding that employer failed to disprove the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), I would also vacate the administrative law judge's prior finding that employer failed to disprove the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4). Moreover, as employer asserts, I would hold that the administrative law judge erred in failing to consider whether it established rebuttal of the presumption at amended Section 411(c)(4) by proving the absence of legal pneumoconiosis. Consequently, I would instruct the administrative law judge, on remand, to consider whether employer has rebutted the presumed existence of both clinical and legal pneumoconiosis, if reached. *See generally Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). I would also instruct the administrative law judge to set forth his findings on remand in detail, including the underlying rationale, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

Finally, because I would vacate the administrative law judge's prior finding that employer failed to disprove the existence of pneumoconiosis at 20 C.F.R. §718.202(a), I would also vacate the administrative law judge's prior finding that employer failed to prove that claimant's pulmonary or respiratory impairment did not arise out of, or in connection with, coal mine employment. I would therefore instruct the administrative law judge to consider whether employer is able to rebut the presumed fact of total disability due to pneumoconiosis, if reached. *See* 20 C.F.R. §718.305(d)(1)(ii).

I agree with the majority in all other respects.

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JUDITH S. BOGGS
Administrative Appeals Judge

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relevant to entitlement. *Webber*, 23 BLR at 1-133. Because the administrative law judge did not adequately explain how he weighed the conflicting digital x-ray interpretations, *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989), I would hold that the administrative law judge's finding at 20 C.F.R. §718.107 does not comply with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Thus, I would instruct the administrative law judge to reconsider the digital x-ray evidence thereunder.